Vision Development Concept Sdn Bhd v Low Sheh Ling and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C-49–03 OF 2019 AND WA-24C-97–06 OF 2019
ALIZA SULAIMAN JC
13 MARCH 2020

Contract — Joint venture — Joint venture agreement — Land owner and developer executed agreements to develop land for housing project — Land owner claimed against developer — Dispute brought before adjudicator pursuant to Construction Industry Payment and Adjudication Act 2012 — Adjudicator made decision in favour of developer — Developer applied to enforce adjudication decision — Land owner applied to set aside and stay adjudication decision — Whether joint venture agreements and supplemental agreements were construction contracts — Whether adjudication papers had been effectively served — Whether financial constraint valid ground to set aside adjudication decision — Whether dispute should be referred to arbitration — Whether stay application ought to be allowed — Whether enforcement application ought to be dismissed — Construction Industry Payment and Adjudication Act 2012 s 38

The dispute between Low Sheh Ling ('LSL') as the owner of three pieces of land ('the lands') and Vision Development Concept Sdn Bhd ('Vision') as the developer, arose from two venture agreements ('JVAs') entered between them to develop the lands for a housing project. In addition, two supplemental agreements ('the SAs') were also executed between the parties. LSL alleged that numerous completed units of shop offices, double storey terrace houses, and double storey semi-detached houses developed by Vision had been sold. However, Vision has failed, refused and/or neglected to entertain requests from LSL to deliver vacant possession of the landowner's entitlement and for profits of the shared units to be paid to her as agreed under the agreements. LSL served the first notice of arbitration on Vision where the claims was denied by Vision. LSL had appointed Datuk Sundra Rajoo to be the arbitrator, however due to the change in the Director of the Asian International Arbitration Centre ('AIAC') at that point in time, the arbitration could not proceed. LSL had to appoint another arbitrator and was advised by AIAC to restart the arbitration process by serving a new notice of arbitration on Vision. Thus, a second notice of arbitration was served upon Vision and they responded with the same set of rebuttals. The dispute was brought before an adjudicator pursuant to the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). The learned adjudicator determined that LSL shall pay Vision, inter alia, the sum of RM2,775,877.32 within ten working days of the adjudication decision. Vision then filed an originating summons for an order, among others, to

register and enforce the adjudication decision pursuant to s 28 of the CIPAA ('the enforcement application') while LSL reciprocated with an originating summons seeking orders to set aside the adjudication decision pursuant to s 15 of the CIPAA, and to stay any and all execution proceedings under the adjudication decision pending the final determination at arbitration and/or the court pursuant to s 16 of the CIPAA ('setting aside and stay applications'). A B

Held, allowing the setting aside and stay applications and dismissing the enforcement application:

(1) The JVAs and SAs were not construction contracts amenable to adjudication under CIPAA. They were in essence joint venture agreements with the elements of profit sharing. The JVAs and SAs were in substance, 'construction joint-venture contracts' ie joint-venture contracts having as their subject matter, construction work, and were not the type of contracts that CIPAA was intended to cover. In these circumstances, the learned adjudicator was devoid of jurisdiction to adjudicate as the JVAs and SAs were not 'construction contracts' amenable to adjudication under CIPAA. LSL had succeeded in establishing its challenge to set aside the adjudication decision on the ground that the learned adjudicator had acted in excess of her jurisdiction (see paras 39, 42–43 & 45). C D E

(2) It was incumbent on Vision to prove that it had served all the adjudication papers on LSL in accordance with s 38 of the CIPAA. Vision had available, during the adjudication, a ready means of contacting LSL, but Vision deliberately chose not to resort to such means and this basically deprived LSL of the opportunity to make representations in the adjudication. Hence, the court ought to decline to enforce the adjudication decision by reason of breach of natural justice. To allow Vision to rely wholly on cl 21 in the JVAs in contending that s 38(d) of the CIPAA had been met, would be contrary to the interests of justice. The adjudication papers had not been effectively served on LSL according to the requirements under s 38 of the CIPAA. The learned adjudicator, in proceeding to determine the issues arising in the adjudication without the payment response and adjudication response due to the non-service of the adjudication papers upon LSL, had breached the audi alteram partem rule by failing to accord LSL a fair hearing where she could present her side of the dispute (see paras 61, 75–76 & 78). F G H

(3) LSL's position that she was facing serious financial constraints and was unable to make the payments as per the adjudicated decision was untenable, legally unsustainable and without merit. Financial constraint was certainly not a valid ground to set aside the adjudication decision (see paras 79 & 81). I

(4) In view of the conclusion that the JVAs and SAs were not constructions contracts falling within the ambit of CIPAA, the dispute between the parties should rightfully be referred to arbitration as provided under cl 24.2 of the JVAs (see para 88).

(5) There had been a denial of natural justice and that the learned adjudicator had acted in excess of her jurisdiction. This was one of the rare cases that had came before the court where an applicant had succeeded in discharging the burden of proving that there were clear errors in the making of such a decision on a balance of probabilities which warranted not only an order to set aside the adjudication decision, but a stay as well. In the premises, LSL's application for a stay of the adjudication decision must be allowed (see paras 91–93).

(6) Since there was merit in LSL's application to set aside the adjudication decision, it must necessarily followed that Vision's application to enforce the same had to be dismissed (see para 96).

[Bahasa Malaysia summary

Pertikaian antara Low Sheh Ling ('LSL') sebagai pemilik tiga bidang tanah ('tanah') dan Vision Development Concept Sdn Bhd ('Vision') sebagai pemaju, timbul daripada dua perjanjian usaha sama ('JVA') yang dimeterai antara mereka untuk membangunkan tanah untuk projek perumahan. Di samping itu, dua perjanjian tambahan ('SA') juga dilaksanakan antara pihak-pihak. LSL mendakwa bahawa banyak unit kedai pejabat, rumah teres dua tingkat dan rumah berkembar dua tingkat yang dibangunkan oleh Vision telah dijual. Namun, Vision telah gagal, menolak dan/atau mengabaikan permintaan daripada LSL untuk memberikan milikan kosong hak pemilik tanah dan untuk keuntungan unit-unit yang dikongsi dibayar kepadanya seperti yang dipersetujui di bawah perjanjian. LSL menyerahkan notis timbang tara pertama kepasa Vision di mana tuntutan tersebut ditolak oleh Vision. LSL telah melantik Datuk Sundra Rajoo sebagai penimbang tara, namun disebabkan pertukaran Pengarah Pusat Timbang Tara Antarabangsa Asia ('AIAC') pada ketika itu, timbang tara tidak dapat diteruskan. LSL harus melantik penimbang tara lain dan dinasihatkan oleh AIAC untuk memulakan semula proses timbang tara dengan menyerahkan notis timbang tara baru kepada Vision. Oleh itu, notis timbang tara kedua diserahkan kepada Vision dan mereka membalas dengan bantahan yang sama. Pertikaian itu dibawa di hadapan adjudikator berdasarkan Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAPIP'). Adjudikator yang bijaksana memutuskan bahawa LSL hendaklah membayar Vision, antara lain, jumlah RM2,775,877.32 dalam tempoh sepuluh hari bekerja dari keputusan adjudikasi. Vision kemudian memfailkan saman pemula untuk perintah, antara lain, untuk mendaftarkan dan menguatkuasakan keputusan adjudikasi menurut s 28 APAPIP ('permohonan penguatkuasaan') sementara LSL membalas dengan saman pemula yang memohon perintah untuk

mengetepikan keputusan adjudikasi berdasarkan ke s 15 APAPIP, dan untuk menangguhkan setiap dan semua prosiding pelaksanaan di bawah keputusan adjudikasi sementara menunggu keputusan akhir di timbang tara dan/atau mahkamah menurut dengan s 16 APAPIP ('permohonan mengetepikan dan penangguhan').

Diputuskan, membenarkan permohonan mengetepikan dan penangguhan dan menolak permohonan penguatkuasaan:

(1) JVA dan SA bukanlah kontrak pembinaan yang tertakluk kepada adjudikasi di bawah APAPIP. Mereka pada dasarnya merupakan perjanjian usaha sama dengan unsur pembahagian keuntungan. JVA dan SA pada dasarnya, 'kontrak usaha sama pembinaan' iaitu kontrak usaha sama yang mempunyai perkara subjek, kerja pembinaan, dan bukan jenis kontrak yang dilindungi oleh APAPIP. Dalam keadaan ini, adjudikator yang bijaksana tidak mempunyai bidang kuasa untuk membicarakan kerana JVA dan SA bukanlah 'kontrak pembinaan' yang tertakluk kepada adjudikasi di bawah APAPIP. LSL telah berjaya membuktikan bantahannya untuk mengetepikan keputusan adjudikasi dengan alasan bahawa adjudikator yang bijaksana telah bertindak melebihi bidang kuasanya (lihat perenggan 39, 42–43 & 45).

(2) Adalah tanggungjawab Vision untuk membuktikan bahwa ia telah menyerahkan semua dokumen adjudikasi kepada LSL mengikut s 38 APAPIP. Vision telah tersedia, semasa adjudikasi, cara untuk menghubungi LSL, tetapi Vision sengaja memilih untuk tidak menggunakan cara sedemikian dan ini pada asasnya menafikan LSL peluang untuk membuat representasi dalam adjudikasi. Oleh itu, mahkamah harus menolak untuk menguatkuasakan keputusan adjudikasi dengan alasan pelanggaran keadilan semula jadi. Dengan membenarkan Vision bergantung sepenuhnya pada klausa 21 JVA dengan berpendapat bahawa s 38(d) APAPIP telah dipenuhi, akan bertentangan dengan kepentingan keadilan. Dokumen adjudikasi tidak disampaikan secara efektif kepada LSL mengikut keperluan di bawah s 38 APAPIP. Adjudikator yang bijaksana, dalam prosiding untuk menentukan isu-isu yang timbul dalam adjudikasi tanpa maklum balas pembayaran dan maklum balas adjudikasi yang disebabkan oleh ketiadaan penyerahan dokumen adjudikasi kepada LSL, telah melanggar peraturan audi alteram partem dengan gagal memberikan LSL pendengaran yang adil di mana dia boleh mengemukakan bahagiannya tentang pertikaian itu (lihat perenggan 61, 75–76 & 78).

(3) Kedudukan LSL bahawa dia menghadapi kekangan kewangan yang serius dan tidak dapat membuat pembayaran mengikut keputusan adjudikasi adalah tidak boleh dipertahankan, tidak boleh dikekalkan dari segi undang-undang dan tanpa merit. Kekangan kewangan

A sememangnya bukan alasan yang sah untuk mengetepikan keputusan adjudikasi (lihat perenggan 79 & 81).

(4) Memandangkan kesimpulan bahawa JVA dan SA bukan kontrak pembinaan yang termasuk dalam APAPIP, perselisihan antara
B pihak-pihak harus dengan tepat dirujuk kepada timbang tara sebagaimana yang diperuntukkan di bawah klausa 24.2 JVA (lihat perenggan 88).

(5) Terdapat penolakan terhadap keadilan semula jadi dan bahawa adjudikasi yang bijaksana telah bertindak melebihi bidang kuasanya. Ini
C adalah salah satu kes yang jarang berlaku yang telah dibawa di hadapan mahkamah di mana pemohon telah berjaya melepaskan beban membuktikan bahawa terdapat kesilapan yang jelas dalam membuat keputusan sedemikian di atas imbangan kebarangkalian yang
D memerlukan bukan sahaja perintah untuk mengetepikan keputusan adjudikasi, tetapi juga penangguhan. Dengan itu, permohonan LSL untuk penangguhan keputusan adjudikasi harus dibenarkan (lihat perenggan 91–93).

(6) Memandangkan terdapat merit dalam permohonan LSL untuk
E mengetepikan keputusan adjudikasi, ini diikuti bahawa permohonan Vision untuk menguatkuasakan perkara yang sama terpaksa ditolak (lihat perenggan 96).]

Cases referred to

F *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776; [2016] 1 LNS 1522, CA (refd)
AMEC Capital Projects Ltd v Whitefriars City Estates Ltd [2005] 1 All ER 723, CA (refd)
AMT Engineering Services v Ah Design Communication Sdn Bhd and another
G *appeal* [2018] MLJU 1860; [2018] 1 LNS 1624, HC (refd)
Ban Soon Aik Construction Sdn Bhd v Berjaya Land Development Sdn Bhd and another appeal [2019] MLJU 1232; [2019] 1 LNS 1614, HC (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)
H *Cantillon Ltd v Urvasco Ltd* [2008] BLR 250, QBD (refd)
Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case [2017] 7 MLJ 732; [2016] 5 CLJ 882, HC (refd)
Gazzriz Sdn Bhd v Hasrat Gemilang Sdn Bhd [2016] MLJU 1054; [2016] 1 LNS 1280, HC (refd)
I *Giatreka Sdn Bhd v SGW Engineering Construction Sdn Bhd and another appeal* [2019] MLJU 1477, HC (refd)
Isman bin Osman v Government of Malaysia [1973] 2 MLJ 143b (refd)
Juara Serata Sdn Bhd v Alpharich Sdn Bhd [2015] 6 MLJ 773, FC (refd)
Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152, FC (refd)

Majlis Perbandaran Alor Gajah lwn Sunrise Teamtrade Sdn Bhd [2014] 7 MLJ 570, HC (refd)
Malaysia Airline System Bhd v Wan Sa' adi @ Syed Sa' adi bin Wan Mustafa [2015] 1 MLJ 757; [2015] 1 CLJ 295, FC (refd)
Nageh v Giddings & Anr [2006] EWHC 3240 (TCC), QBD (refd)
Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals [2015] MLJU 1873; [2015] 1 LNS 1435, HC (refd)
Rohde Construction v Markham-David [2006] EWHC 814 (TCC); [2006] BLR 291, QBD (refd)
Skyworld Development Sdn Bhd v Zalam Corp Sdn Bhd and other appeals [2019] MLJU 162; [2019] 1 LNS 173, HC (refd)
Syarikat Bina Darul Aman Berhad & Anor v Government of Malaysia [2017] MLJU 673; [2018] 4 CLJ 248; [2017] 4 AMR 477, HC (refd)
Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case [2017] MLJU 242; [2017] 7 AMR 887, HC (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22; [2019] 5 CLJ 479, FC (refd)
Wong Huat Construction Co v Ireka Engineering & Construction Sdn Bhd [2018] 7 MLJ 659; [2018] 1 CLJ 536, HC (refd)
YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd and other applications [2017] MLJU 632; [2017] 1 LNS 601, HC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 2, 4, 5, 5(2), 8(1), 13, 15, 16, 16(1), 28, 36, 37(1), 38, 38(a), (b), (c), (d)
Interpretation Acts 1948 and 1967

Thomas Shaun Mathews (Mohanadass Partnership) for the applicant.
Angeline Ang Mei Fong (Chee Hoe & Assoc) for the respondent.

Aliza Sulaiman JC:

INTRODUCTION

[1] The dispute between Low Sheh Ling ('LSL'), as the owner of three pieces of land in Sepang, Selangor, and Vision Development Concept Sdn Bhd ('Vision') as the developer, arose from the joint venture agreements entered between them to develop the Sepang lands for a housing project. The dispute was brought before an adjudicator pursuant to the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('the CIPAA').

[2] On 11 January 2019, the learned adjudicator, Sabarina Samadi, determined that LSL shall pay Vision: (a) the sum of RM2,775,877.32 within ten working days of the adjudication decision; (b) interest at the rate of 5% upon the said sum within ten working days from the adjudication decision

A until the date of full realisation; and (c) costs of the adjudication proceedings in the sum of RM80,989 within ten working days from the adjudication decision ('said adjudication decision').

B **[3]** Vision then filed originating summons ('OS') No WA-24C-49–03 of 2019 for an order, among others, to register and enforce the said adjudication decision pursuant to s 28 of the CIPAA ('enforcement application') while LSL reciprocated with OS No WA-24C-97–06 of 2019 seeking orders to set aside the said adjudication decision pursuant to s 15 of the CIPAA, and to stay any and all execution proceedings under the said adjudication decision pending the final determination at arbitration and/or the court pursuant to s 16 of the CIPAA ('setting aside and stay applications').

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D **[4]** The parties agreed for all applications to be heard together. Following brief oral submissions by counsels representing the parties, and having read the OS, affidavits and written submissions filed, the court allowed the setting aside and stay applications with costs of RM10,000, and dismissed the enforcement application with costs of RM5,000. Both order as to costs are subject to the payment of the allocator fees.

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[5] Vision has since filed two notices of appeal against my decision and herein is my full reasons for the same.

SALIENT BACKGROUND FACTS

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[6] LSL is the registered owner of three pieces of freehold land namely, GM 80 Lot 2798; GM 81 Lot 2797; and GM 82 Lot 2796, Tempat Jalan Teluk Datok, Mukim Dengkil, Daerah Sepang, Negeri Selangor ('GM 80', 'GM 81' and 'GM 82', respectively, and 'said lands', collectively).

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[7] Vision is an investment holding company carrying on business as a housing developer and it had approached LSL with the intention of developing the said lands for purposes of a housing project.

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[8] Negotiations eventually led to the execution of the following agreements between Vision as the developer and LSL as the land owner:

(a) the joint venture agreement dated 15 August 2011 in respect of GM 81 and GM 82 ('first JVA') wherein LSL had, in essence, agreed to handover GM 81 and GM 82 to Vision to develop 114 units of houses and shop lots with a total value of RM47,660,000 in consideration of 30% of all the approved units ('landowner's entitlement') valued at RM14,298,000. Vision shall be entitled to 70% of the total approved units;

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(b) the joint venture agreement dated 22 December 2011 in respect of GM 80 on basically similar terms and conditions as the first JVA but this time to develop 272 units of apartments, houses and shop lots with a total value of RM75,440,000 in consideration of 30% of the landowner's entitlement valued at RM22,632,000 ('second JVA'; the first JVA and second JVA shall hereafter be referred to as the 'said JVAs');

(c) the supplemental agreement dated 22 December 2011 where LSL agreed to charge the said lands as security for Vision to obtain a bridging/term loan to enable the development of the projects ('first SA'); and

(d) the supplemental agreement dated 21 February 2014 following the charge on the said lands to Sabah Development Bank Bhd ('said bank') in consideration of the said bank providing a banker's guarantee ('second SA'; the first SA and second SA shall hereafter be referred to as the 'said SAs'). The second SA provides for, among others, the execution of a power of attorney by LSL, the conditions of calling on the banker's guarantee by LSL and LSL's warranty.

[9] LSL's warranty in the second SA was necessitated due to some complications which arose as regards the levelling of the said lands. Under the first JVA, LSL had agreed to complete the levelling of earth and handover GM 81 and GM 82 within 15 months from 15 August 2011, ie on or before 15 November 2012. Under the second JVA, LSL had agreed to complete the same earthworks and handover GM 80 within 15 months from 22 December 2011, ie on or before 22 March 2013. Under cl 3 of the second SA, LSL and Vision then agreed to vary the date of handing over of the said lands to Vision from 15 November 2012 and 22 March 2013 to 30 March 2014.

[10] LSL had additionally agreed that should there be any further delay in the completion of earthworks, Vision shall have the right to enter the said lands and deduct all cost and expenditure to complete the earthworks from the landowner's entitlement. It was further agreed in cl 4 of the second SA, inter alia, that the parties would also share the profits of the sale of additional units ('said shared units').

[11] On 28 October 2014, Vision's solicitors wrote to LSL's solicitors stating that the earthwork done by LSL had resulted in a steep slope which causes or might cause landslides and/or mudslides during heavy rain; failed to meet the requirements by the authorities; obstructed Vision's main contractors from constructing and/or completing the construction works; and hindered Vision from obtaining the certificate of completion and compliance ('CCC') from the relevant authorities. Vision requested that LSL provide an undertaking to convert the steep slope to the same level as the finished level on the said lands on or before 30 June 2015.

[12] In a letter dated 20 March 2018 from LSL's solicitors to Vision's solicitors, reference was made to the aforesaid letter dated 28 October 2014 and the fact that Vision's solicitors had confirmed that the said lands were given to Vision on 8 June 2015.

[13] The CCC in respect of the projects were issued on 8 November 2017 and 27 February 2018.

[14] LSL alleged that numerous completed units of shop offices, double storey terrace houses, and double storey semi-detached houses developed by Vision have been sold. However, Vision has failed, refused and/or neglected to entertain requests from LSL to deliver vacant possession of the landowner's entitlement and for profits of the shared units to be paid to her as agreed under the above mentioned agreements.

[15] On 16 August 2018, LSL served the first notice of arbitration on Vision. The solicitors representing Vision, Messrs Syed Ibrahim & Co, had replied denying the claims in that notice of arbitration.

[16] LSL had appointed Datuk Sundra Rajoo to be the arbitrator, however due to the change in the Director of the Asian International Arbitration Centre ('AIAC') at that point in time, the arbitration could not proceed.

[17] LSL had to appoint another arbitrator and was advised by AIAC to re-start the arbitration process by serving a new notice of arbitration on Vision. Thus, on 19 December 2018, a second notice of arbitration was served upon Vision and Messrs Syed Ibrahim & Co responded with the same set of rebuttals.

[18] The core issues to be determined in the arbitration are whether:

(a) Vision had breached the said JVAs and second SA by failing to deliver vacant possession of the parcels of the landowner's entitlement;

(b) LSL is entitled to liquidated ascertained damages ('LAD') as a result of Vision's failure to deliver vacant possession of the parcels of the landowner's entitlement;

(c) LSL is entitled to all the proceeds of sale of the shared units and the landowner's entitlement under the said JVAs and second SA; and

(d) LSL is entitled to the keys and full access to all units of the parcels under the landowner's entitlement.

OS No WA-24C-97–06 of 2019

Setting aside application

[19] Section 15 of the CIPAA provides limited grounds to set aside an adjudication decision. The grounds relied on by LSL to set aside the said adjudication decision as stated in the OS are that:

(a) the adjudicator has acted in excess of her jurisdiction;

(b) the said adjudication decision was improperly procured; and

(c) there was a denial or breach of natural justice since:

(i) none of the adjudication papers were served on LSL;

(ii) Vision had purposefully served all adjudication papers on LSL's old address even though it was obvious that the house had long been abandoned;

(iii) Vision however had served OS No WA-24C-49–03 of 2019 to LSL's current/correct address; and

(iv) LSL was never given a chance to defend herself and ventilate any issues arising from Vision's adjudication.

Hence, from the OS as well as the affidavits and submissions filed by LSL, it is basically relying on the following limbs under s 15 of the CIPAA:

> 15 Improperly procured adjudication decision
>
> *An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:*
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> ...
>
> (b) there has been a denial of natural justice;
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> ...
>
> (d) the adjudicator has acted in excess of his jurisdiction.

[20] I will first deal with the issue as stated in sub-para 19(a) above.

Are the said JVAs and said SAs construction contracts?

Submissions by LSL

[21] It is LSL's submission that the learned adjudicator had acted in excess of her jurisdiction in delivering a decision pertaining to a dispute on contracts which are not construction work contracts nor a dispute for payment allegedly unpaid under a construction work contract. LSL relied on several definitions under s 4 of the CIPAA and the judgment of Lee Swee Seng J (now JCA) in

YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd and other applications [2017] MLJU 632; [2017] 1 LNS 601 to support her submission.

[22] Ms Angeline Ang expanded on this contention by inviting the court to consider the said JVAs as a whole wherein it would be clear that emphasis is placed on the contractual obligations and entitlements of each party rather than the construction works. This is an indicia that the said JVAs are, in essence, profit-sharing contracts and not construction contracts within the meaning of CIPAA. Furthermore, the dispute between the parties is principally over the terms and conditions in the said JVAs and second SA, which were entered into purely for the purposes of sharing the profits from the sale of the units in the projects with the earthworks to be carried out by LSL being merely ancillary to give effect to the main purpose of the said JVAs.

[23] Learned counsel illustrated her submission with reference to several clauses, said to be non-exhaustive, in the said JVAs, namely cll 3.3, 4.1, 4.2, 4.10 and 8.1, which indicate th:at

(a) LSL was to undertake all earthwork necessary without the involvement of Vision, other than agreeing on the date of completion of earthworks, upon which handover of the said lands was to take place. Vision was not party to any earthwork contracts;

(b) Vision was to obtain the necessary approvals and develop the said lands with no involvement of LSL. LSL was not party to any development contracts;

(c) until the enforcement application was filed, LSL had no knowledge as to the existence of, nor of the terms contained in, any of the contracts for developing the said lands as exhibited in Vision's adjudication claim; and

(d) there are no express terms for the payment of earthworks and/or payment towards the development of the units of properties.

[24] In anticipation that Vision may argue that the earthworks which were to be carried out by LSL falls within the definition of 'construction work' under CIPAA, LSL submitted that it is unreasonable for Vision to claim to be an unpaid party in its payment claim and adjudication claim when there are no terms in the said JVAs and second SA for payment for work and/or services.

[25] Emphasis was also placed on the fact that CIPAA was introduced to facilitate regular and timely payment, provide a mechanism for speedy dispute resolution and remedies for the recovery of payment in the construction industry, but not to resolve disputes on a plain breach of a joint venture agreement. Therefore, LSL contended that it is clearly erroneous for the learned adjudicator to have awarded payment to Vision when there was no

'construction contract', no payment for work done or services rendered under the express terms of a construction contract, and no 'unpaid party' falling within the ambit of CIPAA.

Submissions by Vision

[26] Vision submitted that the said JVAs and said SAs are:

(a) for the construction of building or structure, and it is not disputed that Vision was engaged to develop housing and commercial units on the said lands; and

(b) for works which form an integral part of 'construction work' ie site clearance, earth-moving, excavation, laying of foundation etc, and it is not disputed that Vision completed the earthworks on behalf of LSL.

Therefore, it is Vision's stand that the definition of 'construction contract' and 'construction work' in s 4 of the CIPAA have been fulfilled.

[27] Mr Thomas Mathews relied on the same case of *YTK Engineering Services* for the legal principle that in deciding whether a joint venture contract constitutes a 'construction contract' within the meaning of s 4 of the CIPAA, 'the Court must look at substance rather than form; essential nature rather than external nomenclature'. It was submitted that the purpose of the said JVAs and said SAs satisfies the aforesaid test and thus, there was no excess of jurisdiction.

Findings of the court

[28] In determining whether the said JVAs and said SAs are indeed construction contracts coming within the scope of CIPAA, the natural starting point would be the provisions on 'Application' and 'Interpretation' in CIPAA. As regards the former, s 2 of the CIPAA states that CIPAA '... applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government'.

[29] The definitions under s 4 of the CIPAA that require further scrutiny for present purposes are as follows:

> 'construction contract' means a construction work contract or construction consultancy contract;
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> 'construction work' means construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of:
>
> (a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;

A (b) any road, harbour works, railway, cableway, canal or aerodrome;

(c) any drainage, irrigation or river control work;

(d) any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work; or

B (e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work,

and includes —

(A) any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil C investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and

(B) procurement of construction materials, equipment or workers, as necessarily required for any works described in paragraphs (a) to (e);

D 'construction work contract' means a contract to carry out construction work;

...

'payment' means a payment for work done or services rendered under the express terms of a construction contract;

E ...

'unpaid party' means a party who claims payment of a sum which has not been paid in whole or in part under a construction contract.

F **[30]** In addition, s 5 of the CIPAA on 'payment claim' also bears relevance to the issue at hand and it reads as follows:

(1) An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.

G (2) The payment claim shall be in writing and shall include —

(a) *the amount claimed and due date for payment of the amount claimed;*

(b) details to identify the cause of action including the provision in the construction contract to which the payment relates;

H (c) description of the work or services to which the payment relates; and

(d) a statement that it is made under this Act.

I **[31]** Moving on to the express terms and conditions in the said JVAs, cl 1.1.13 defines the words 'the Development' to mean 'the number and types of buildings and the infrastructure as shall be finally approved by the Relevant Authorities to be erectedadjudicator/constructed on the Project Land'. Clause 3 with the heading 'AGREEMENT TO DEVELOP' states as follows:

3.1 IN CONSIDERATION of and subject to the respective agreements, covenants, stipulations, undertakings and obligations of the parties to be observed and performed as hereinafter set out and in further consideration of the sum of Ringgit Malaysia Six Hundred Thousand (RM600,000.00) only (inclusive of Ringgit Malaysia Fifty Thousand (RM50,000.00) paid earlier by the Developer to the Landowner prior to the execution of this agreement) as security deposit now paid by the Developer to the Landowner (the receipt whereof the Landowner hereby acknowledges), the Landowner hereby agrees and allows the Developer to develop and sell and the Developer agrees to develop and sell the Developer's Entitlement by undertaking the Development at the Developer's cost and expense and upon the terms and conditions hereinafter set out.

...

3.3 It is hereby expressly agreed and declared that the planning type, specifications for all type of buildings and all other matters and things relating to the Project Land and its construction shall be left to the entire and absolute discretion of the Developer which are to be approved by the relevant authorities.

[32] The next relevant provisions in the said JVAs come within the ambit of 'COMMENCEMENT OF THE DEVELOPMENT' and these read:

4.1 Subject to Clause 4.10 hereof the Developer shall at its own costs and expenses undertake to complete the Development in accordance with the Relevant Approvals and within the time stipulated hereunder and are solely responsible for its successful completion.

4.2 The Developer shall within six (6) calendar months from the date of execution of this Agreement, at its own cost and expense prepare and submit the Layout Plan of the Project Land (hereinafter called 'the said Layout Plan') to the appropriate authorities for the requisite approval, such Layout Plan to be prepared in such manner as the Developer shall in its absolute discretion think fit and proper and the Landowner shall not object or require the Developer to made any amendments to the said Layout Plan in any way whatsoever. The Developer shall however supply a copy of the said Layout Plan to the Landowner for perusal upon request by the Landowner.

...

[33] LSL's obligations in respect of earthworks can be found in cl 4.10 in the said JVAs:

The Landowner shall commence at its own cost and expense clearing, levelling and if so deemed expedient by the Developer in its own absolute discretion earth-filling works on the Project Land so as to render the same suitable and ready for the construction within Fifteen (15) months from the date of this Agreement on the property wherein the final level of the Land shall be at one (1) meter higher than the existing expressway (new access road from Dengkil to Kajang) without the need of construction of any retaining wall and all costs and expenses arising therefrom (including but not limited to payment of approval, fines and levies imposed by authorities) shall be borne and paid by the Land Owner.

[34] The agreement as to the sharing of profits between Vision and LSL is borne out in these clauses in the said JVAs:

> 1.1.4. 'Developer's Entitlement' means *SEVENTY PER CENTUM (70%)* of all the approved units.
>
> ...
>
> 1.1.7 'Landowner's Entitlement' means *THIRTY PER CENTUM (30%)* of all the approved units.
>
> ...
>
> *LANDOWNER'S ENTITLEMENT AND OTHER RIGHTS*
>
> 8.1 The parties hereto hereby agree that subject to all requisite approvals consents and permissions being obtained from the competent authorities by the Developer it is hereby expressly agreed and declared that out of all the approved subdivided buildings lots and the different type of houses to be erected thereon by the Developer, the Landowner shall be entitled to *Thirty percent (30%)* of total approved units built which are to be equally selected among all unit types and locations (hereinafter referred to as 'the Landowner's Entitlement'). In the event, the apportionment of the Landowner's Entitlement is a partial unit, the Landowner has the first option to purchase the share from the Developer or the partially own unit(s) shall be sold and the Purchase Price shall be distributed according to the percentage own by the Landowner and Developer upon payment of the full purchase price. In the event of a unique unit (ie only one (1) type available) the unique unit shall be sold and the Purchase Price shall be distributed according to the percentage own by the Landowner and Developer upon payment of the full purchase price.
>
> ...

[35] Clauses 15 and 23 in the said JVAs bear relevance to the issue as to the contractual provisions relating to the claim in dispute as cited by Vision in its adjudication pleadings. These two clauses are worded in this manner:

> 15. Vacant possession of the Project Land shall be given to the Developer immediately upon completion of final level of the Land as agreed in Clause 4.10 duly undertaken by the Landowner to enable the Developer to carry out the necessary preliminary works thereon. It is hereby agreed between the parties hereto that in the event the Landowner shall fail to deliver Vacant Possession within Fifteen (15) Months from the date hereof the number of days elapsed thereto until the actual date of delivery of Vacant Possession shall be added to the period of Completion for the Developer to complete his duties.
>
> ...
>
> 23. All taxes on profits/property gains made or secured by the Landowner on the Landowner's Entitlement shall be the sole responsibility of the Landowner and shall be borne and paid by the Landowner to the relevant tax authorities. However, all taxes on profits/income made or secured by the Developer on the sale of all buildings (excluding the Landowner's Entitlement) shall be the sole responsibility of the Developer and shall be borne by the Developer to the relevant tax authorities.

[36] Subsequent to the execution of the said JVAs, the parties found it necessary to execute the first SA on 22 December 2011 and second SA approximately two years and two months later on 21 February 2014. The important clause to note in the latter agreement is cll 3 and 4 which are re-produced below:

3. *LANDOWNER'S WARRANTS TO THE FOLLOWING:*

The Landowner shall complete all clearing and levelling works on the Project Lands ('Earthworks') in accordance to clause 4.10 of the Joint Venture Agreements and deliver vacant possession of the Project Lands on or before *30th March 2014*. In the event the Landowner fails to complete the Earthworks on or before the *30th March 2014*, the Developer shall have the right to enter the Projects Lands and deduct all cost and expenditure to complete the Earthworks from the Landowner's entitlement at the sole discretion of the Developer. The Developer shall give 1 week notice to the Landowner or Messrs Malliga & Associates ('the Landowner's Solicitors') in writing of their intentions to enter the Projects Land before they obtain vacant possession of the said property. The Landowner shall also complete all earthwork on the neighbouring lot (Lot 2795) before 3first December 2014.

4. *LANDOWNERS' ALLOCATION OF UNITS*

As per the Joint Venture Agreement dated 15th August 2011, Clause 8, the Landowner and the Developer's representative mutually agreed, pursuant to a meeting held on 9.01.2014 at the Developer's office that the Landowners entitlement and the Developers entitlement is attached and referred as Appendix 'A'.

a. As regards to 'SHOP OFFICE' unit No 16, the Landowner shall be entitled to 70% of sales value whereas the balance of 30% of sales value is the Developers entitlement. Unit No 16 shall be sold by the Developer and proceeds of the sale shall be apportioned upon completion of the sale. In the event that Landowner intends to purchase the Unit No 16 the Landowner shall execute a Sale and Purchase Agreement with the Developer within 14 days from the official Launch of the Project.

b. As to regards to 'SHOP OFFICE' unit No 19, the Developer shall pay a sum of Ringgit Malaysia Eighty Thousand (RM80,000.00) being the apportionment sum to the Landowner within Fourteen (14) days upon issuance of the Certificate of Compliance and Completion.

[37] The basis of the claim and due date for payment as stated in Vision's payment claim are shown below:

Basis of claim	:	• Cost incurred in respect of the Earthworks in the sum of RM163,581.21. • Government Service Tax ('GST') 6% wrongfully paid by the unpaid party on behalf of the Non-paying Party in the sum of RM482,258.81.

	• Loss and expense incurred as a result of the non-paying party's delay in handing over vacant possession to the unpaid party in the sum of RM4,885,652.09. The breakdown of this sum are as follows:- (a) liquidated ascertained damages ('LAD') claim by purchases of units in Taman Jenderam Damai against the Unpaid Party in the sum of RM1,423,106.94; (b) overhead cost incurred as a result of prolongation to the completion date of the project RM2,067,080.71; and (c) interest, commitment fee and penalty imposed by Sabah Development Bank Bhd against the unpaid party in the sum of RM1,395,464.44 for late repayment of loan sum.
Due date for payment :	• 28 May 2018 for cost incurred in respect of the Earthworks. • 9 February 2018 for payment in respect of GST on the value of work completed. • 1 January 2014 for payment in respect of damages incurred as a result of the non-paying party's delay in handing over vacant possession of the project lands.

[38] In para 17 of the adjudication claim, Vision has cited the relevant contractual provisions in relation to the dispute in the following manner:

(a) claim for cost incurred in respect of the earthworks: cl 3 in the second SA;

(b) claim for Goods and Services Tax ('GST') wrongfully paid by Vision on LSL's behalf: cl 23 in the said JVAs;

(c) claim for prolongation costs as a result of LSL's alleged delay: cl 15 in the said JVAs; and

(d) alternatively, the default provisions in the absence of terms of payment under s 36 of the CIPAA shall apply.

[39] Apart from the above quoted provisions in the said JVAs and second SA, I have read the said JVAs and said SAs in their entirety and it is the findings of this court that:

(a) the said JVAs and said SAs involve the construction of the types of property as tabulated in *Annexure-II* in the said JVAs, being various types of apartments, houses and shop lots, and as such would satisfy the definition of '*construction work*' under CIPAA;

(b) vision is not an 'unpaid party' coming within the meaning of CIPAA because it is not claiming 'payment of a sum which has not been paid in whole or in part under a construction contract'. Vision's claim in the adjudication was for costs incurred for the earthworks and GST paid on the certified value of the development works; and additional costs incurred as a result of LSL's delays in handing over vacant possession of the said lands in the form of LAD demanded by the purchasers of the property units, overheads and interest charged by the bank. However, cl 3 in the second SA plainly stipulates that Vision's contractual recourse in the event that LSL fails to complete the earthworks on or before 30 March 2014 is to have the right to enter the said lands and deduct all cost and expenditure to complete the earthworks from the landowner's entitlement. There is no provision in the said JVAs and said SAs entitling Vision to claim the costs as it did in the adjudication;

(c) there is no payment for work done or services rendered under the express terms of the said JVAs and said SA. Clause 8.1 in the said JVAs contains the express agreement and declaration of intention of the parties that out of all the approved subdivided buildings lots and the different type of houses to be erected on the said lands by Vision, LSL shall be entitled to the landowner's entitlement which is 30% of the total approved units built. Thereafter, a meeting was held at Vision's office on 9 January 2014 whereby the parties have evidently reached further agreement as to the allocation of units for LSL since the landowner's entitlement and Developer's Entitlement were particularised and attached to the second SA as Appendix 'A': see cl 4 in the second SA. The same clause goes on to provide in paras (a) and (b) as to the arrangement in respect of Units No 16 and 19 for the shop office;

(d) in the adjudication claim, Vision relied on cl 3 in the second SA, and cll 15 and 23 in the said JVAs as providing the contractual basis for the claim in dispute. However, whilst these clauses may be so, it does not necessarily mean that reliance on these clauses would satisfy the key definitions and the statutory provision on 'payment claim' in ss 4 and 5 of the CIPAA for a claim to be brought pursuant to that statute, as opposed to a claim in arbitration or to the court. In fact, I am unable to find a single clause in the said JVAs and/or said SAs which provides for any obligation on the part of LSL to pay Vision for work done or services rendered by a certain date to enable Vision to serve its payment claim with a 'due date for payment' of RM5,531,692.11 as claimed; and

(e) the said JVAs and said SAs are not construction contracts amenable to adjudication under CIPAA. Instead, read together, they are in essence joint venture agreements with the elements of profit sharing. In arriving at this conclusion, I was aided by the authority cited by both learned counsels, namely *YTK Engineering Services Sdn Bhd v Towards Green Sdn*

Bhd and other applications [2017] MLJU 632; [2017] 1 LNS 601. The High Court in that case was faced with a similar conundrum in having to decide whether the contract agreement, where YTK Engineering Services Sdn Bhd engaged Towards Green Sdn Bhd for the Tanjung Bin 4 Coal Fired Power Plant Unit 4, 1000MW in Johor, is a construction contract or a joint-venture profit sharing contract. In the course of His Lordship's analysis, Lee Swee Seng J said:

> [10] Reading the peculiar clauses in the contract of 16 January 2014, I would say that *the joint-venture and profit-sharing element permeates the whole agreement. The profit-sharing element is so prominent as to give the agreement its essential colour and characteristic*.
>
> [11] These terms of the contract are of particular relevance:
>
> ...
>
> 3. The Seller Party further agrees that:
>
> ...
>
> h) *Net Profit or loss made after tax is to be divided by 60% to Buyer and 40% to Seller. Buyer will invoice to Seller amount to 60% of net profit or loss progressively from SEE project.*
>
> ...
>
> [29] *The dispute though it involves payment claims for work done is principally and prominently a dispute over profit-sharing in a joint-venture contract*. No doubt somebody would have to bear the cost of providing labour and machinery but that is what the joint venturers are at liberty to structure in their joint-venture agreement. Here it appears that the claimant would be the one doing the work and a proper accounting of the profit or loss taken at the end of the day, though contractually under cl 3(h) of the contract, the claimant was to invoice the net profit or loss progressively.
>
> ...
>
> [31] *When the jurisdictional ground was raised in that this dispute is essentially a dispute of the joint venturers on whether there is profit or loss, one must appreciate the context of the dispute for what it is, in that such a dispute would not ordinarily arise in a pure contractor-subcontractor relationship as the parties would not be talking about sharing profit or losses or who to pay who*.
>
> ...
>
> [33] There is a very real sense in which *the joint venture element overwhelms the true nature and colour of the contract between the two parties. Whilst it is true that it is in relation to construction works, that by itself, does not make it a construction contract for the purpose of adjudication, but rather it maintains its essential distinguishing element of being a joint venture contract which has the element of construction works*. (Emphasis added.)

[40] His Lordship additionally considered the long title to, and chapeau in s 4 of the CIPAA and the Interpretation Acts 1948 and 1967 (Act 388) in coming to the following conclusion:

> [34] The interpretation section in section 4 CIPAA is prefaced with the qualifying words '... unless the context otherwise requires ...'. *The context here is prominently and predominantly that of a Joint-Venture Contract where parties are free to apportion their risk and rewards accordingly and so are able to manage their so-called cash flow problem and if not, they are not the people that CIPAA is designed to help*. All is not lost, as in a properly-structured agreement, the Claimant can always proceed with summary judgment if indeed there are no triable issues.
>
> [35] I would also apply an interpretation that best promote the purpose of the Act as enjoined by s 17A of the Interpretation Act 1948 and 1967 which reads:
>
> > 17A. In the interpretation of a provision of an Act, a construction that would *promote the purpose or object underlying the Act* (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object. (Emphasis added.)
>
> [36] The long title to CIPAA sets out its preamble and captures in a concise statement the prophylactics purpose of the Act which is to:
>
> > ... facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.
>
> [37] It is only too obvious that *a joint-venture profit sharing contract is a commercial contract where the problem of cash flow arising out of work done by a contracting party is not the kind of contracts where protection of a speedy resolution is intended*. In fact the disputes that stem of the sharing of profit or loss would be more convoluted and complicated, arising as it would from issues like the calculation of costs, the meaning and calculation of net profit and loss and a multitude of other factors. In short *it is not a straight-forward claim for a pre-agreed or certified sum for work done or services rendered*. (Emphasis added.)

[41] Vision and LSL entered into the said JVAs solely for the purpose of sharing the profits from the sale of the units to be constructed on the said lands. Clause 4.10 in the said JVAs place the obligation to carry out earthworks solely on LSL and cl 3 in the second SA provides for the event of failure by LSL to do so, which notably does not involve any payment claims, but instead gives Vision the right to enter the said lands and deduct all cost and expenditure to complete the earthworks from LSL's entitlement at Vision's sole discretion.

[42] I am of the view that the sound legal reasoning of the court in *YTK Engineering Services* can be applied in parallel to the instant case, which would result in a similar finding that the said JVAs and said SAs are in substance, 'construction joint-venture contracts' ie joint-venture contracts having as their

subject matter, construction work, and are not the type of contracts that CIPAA is intended to cover.

[43] In these circumstances, the learned adjudicator is devoid of jurisdiction to adjudicate as the said JVAs and said SAs are not '*construction contracts*' amenable to adjudication under CIPAA. The jurisdiction in issue here falls within the category of core jurisdiction as elucidated in *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case* [2017] MLJU 242; [2017] 7 AMR 887 and cited with approval by the Federal Court in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2019] 5 CLJ 479. At pp 913–914 of the report on *Terminal Perintis* Lee Swee Seng J (as His Lordship then was) held that:

> [72] Core jurisdiction would be the question of whether the subject matter of the dispute is one which the Act has conferred on the adjudicator … It is a case where the adjudicator has no jurisdiction to begin with. So too if the construction contract is carried out wholly outside Malaysia.

[44] Returning to *YTK Engineering Services*, His Lordship also spoke of core jurisdiction in these terms:

> [59] However here we are talking about his *core jurisdiction as in whether CIPAA confers jurisdiction on an adjudicator with respect to the type of 'construction contract' that falls within the ambit and powers of an adjudicator under the scheme of statutory adjudication*. Thus a construction contract for the construction of a house by a natural person for the buyer's occupation and a non-payment under it would not be a matter that is covered under CIPAA because of its non-application section under s 3 CIPAA. Likewise a construction contract for construction work carried out wholly outside the territory of Malaysia. So too would be a shipping contract or a mining contract which does not fall within the meaning of 'construction work' under s 4 and hence not a 'construction contract' under ss 2 and 4 of CIPAA.
>
> [60] *An adjudicator cannot adjudicate a payment claim made under any contract but only one made under a 'construction contract' as set out under the 'Application' section in s 2 and as defined in s 4 and as one not coming within the non-application provision of s 3.*
>
> [61] *Where CIPAA does not confer jurisdiction on the adjudicator to adjudicate a payment claim because it does not fall within the meaning of 'construction contract' then the adjudicator cannot erroneously assume jurisdiction. This is because it relates to his core jurisdiction which Parliament under CIPAA has not conferred jurisdiction on him*.
>
> [62] *Where an adjudicator makes an error with respect to his core jurisdiction, this court is at liberty to set the decision aside on ground that he had no jurisdiction to adjudicate and hence exceeded his jurisdiction by proceeding to adjudicate when he should not have*. (Emphasis added.)

[45] Based on all the aforesaid considerations, this court is of the view that LSL has succeeded in establishing its challenge to set aside the said adjudication decision on the ground that the learned adjudicator had acted in excess of her jurisdiction.

Service of the adjudication papers

[46] On the assumption that the learned adjudicator had core jurisdiction to hear and decide on the adjudication, I shall now proceed to discuss the next main issue surrounding the service of the adjudication papers by Vision onto LSL.

Submissions by LSL

[47] LSL relied on the principle of natural justice endorsed by the courts in *Isman bin Osman v Government of Malaysia* [1973] 2 MLJ 143b; *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152; and *Malaysia Airline System Bhd v Wan Sa' adi @ Syed Sa' adi bin Wan Mustafa* [2015] 1 MLJ 757; [2015] 1 CLJ 295 in submitting that the learned adjudicator had failed to said adjudication decision despite the fact that Vision had stated in its adjudication claim that the delivery report for service of the payment claim and notice of adjudication indicated that service of these documents was unsuccessful, and without giving LSL the right to be heard.

[48] In response to Vision's reliance on s 38(d) of the CIPAA that service of the adjudication papers at the address as stated in the said JVAs was as agreed by the parties vide cl 21 of the said JVAs, Ms Angeline Ang submitted that the learned adjudicator had accepted Vision's claim without questioning that the said JVAs were entered into eight years ago whereby the addresses for both parties have since changed. In addition, the learned adjudicator deemed the adjudication papers to be 'notices' under cl 21 of the said JVAs.

[49] Ironically, LSL argued that after the said adjudication decision was given and for purposes of enforcement of the same, Vision actually conducted an IC search to find LSL's last known address, to which Vision's cause papers for the enforcement application were then served on LSL's correct address.

Submissions by Vision

[50] Vision's counter argument is that it had notified Messrs Peter Ling & Van Geyzel, the solicitors who represented LSL in the arbitration, to seek confirmation if they have instructions to act on behalf of LSL in respect of the adjudication proceedings to which LSL's solicitors replied in the negative.

Therefore, this is a case where LSL had full knowledge of the adjudication proceedings and yet she failed to take steps to appoint another set of solicitors.

[51] Mr Thomas Mathews referred to the decision of the High Court in *Gazzriz Sdn Bhd v Hasrat Gemilang Sdn Bhd* [2016] MLJU 1054; [2016] 1 LNS 1280 to support his submission that in the circumstances of this case, LSL is not allowed to complain of breach of natural justice. Furthermore, the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 was cited as authority for the proposition that LSL is estopped from taking her chosen position as the basis to oppose the said adjudication decision.

[52] In any event, Vision submitted that service of the Adjudication cause papers was valid pursuant to s 38 of the CIPAA which contemplates service 'by sending the notice or document to the usual or last-known place of business of the party by registered post'. In this regard, Vision has served all the cause papers in relation to the adjudication proceedings to the address identified in cl 21 of the said JVAs in the manner as provided in cl 21.2. There was no notification by LSL of any change in address and nor is Vision aware of any other addresses of LSL.

Findings of the court

[53] The said adjudication decision is binding unless, among others, it is set aside by this court on any of the grounds relied upon by SLS which comes within s 15 of the CIPAA, or the dispute between the parties is finally decided by arbitration or the court: see s 13 of the CIPAA.

[54] The common law rules of natural justice or procedural fairness are two-fold; the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made, and the person affected has the right to an unbiased tribunal: see per Dyson LJ in *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] 1 All ER 723 at p 730. These rules are often expressed in the Latin maxims *audi alteram partem* and *nemo judex in caus sua*, respectively.

[55] The guidelines relating to breaches of natural justice in adjudication cases can be found in *Cantillon Ltd v Urvasco Ltd* [2008] BLR 250 and these have been applied by several Malaysian cases such as *Syarikat Bina Darul Aman Berhad & Anor v Government of Malaysia* [2017] MLJU 673; [2018] 4 CLJ 248; [2017] 4 AMR 477; *Wong Huat Construction Co v Ireka Engineering & Construction Sdn Bhd* [2018] 7 MLJ 659; [2018] 1 CLJ 536; *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case* [2017] 7 MLJ 732; [2016] 5 CLJ 882; *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873; [2015] 1 LNS 1435; and *ACFM Engineering &*

Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal [2016] MLJU 1776; [2016] 1 LNS 1522 (see too, *Construction Adjudication in Malaysia* (2nd Ed, Sweet & Maxwell, 2018) by Lam Wai Loon and Ivan YF Loo at pp 227–232 and 380–410).

[56] The procedures for the service of notices or other documents under CIPAA is provided in s 38 and it states:

> Service of a notice or any other document under this Act shall be effected on the party to be served —
>
> (a) by delivering the notice or document personally to the party;
>
> (b) by leaving the notice or document at the usual place of business of the party during the normal business hours of that party;
>
> (c) by sending the notice or document to the usual or last-known place of business of the party by registered post; or
>
> (d) by any other means as agreed in writing by the parties.

[57] Clause 21.1 on 'NOTICES' in the said JVAs is re-produced in full below for ease of reference:

> 21.1 Any notices to be given or made under this Agreement to the Landowner or the Developer shall be in writing addressed to the addresses specified below:-
>
> For the Landowner: Lot 5668, Batu 26, Jalan Desa Putra, Sungai Merab, Bandar Baru Bangi, Kajang, 43560 Selangor
>
> For the Developer: 2nd Floor, C-2-4, Plaza Damas, No 60, Jalan Sri Hartmas, 50480 Kuala Lumpur.
>
> 21.2 Any such notice shall be deemed to have been sufficiently given or served if the same is forwarded by registered post addressed to such party at their respective addresses herein stated and/or their last known addresses and shall be deemed to have been received on the date on which it would have been so delivered in the normal course of posting.

[58] Vision claims to have complied with s 38(c) of the CIPAA by sending the notice of adjudication dated 25 September 2019 by registered post to LSL's address at Lot 5668, Batu 26, Jalan Desa Putra, Sg Merab, Bandar Baru Bangi, Kajang, 43560 Selangor ('Sg Merab address'), which is the address stated 'For the Landowner' in cl 21.1 of the said JVAs (see the covering letter dated 25 September 2018 from Messrs Mohanadass Partnership to LSL in exh 'CKW3' in Vision's affidavit in support ('AIS') for the enforcement application at pp 186–188 (encl 2), and exh 'LSL3' in LSL's affidavit in reply ('AIR') (1) for the setting aside and stay application at p 85 (encl 3)). However, a perusal of the tracking record at pp 187–188 in the said exh 'CKW3' clearly shows that the delivery was unsuccessful.

[59] Vision also relied on the letter dated 16 October 2018 from Messrs Mohanadass Partnership to Messrs Peter Ling & Van Geyzel, LSL's solicitors for the arbitration matter, wherein Vision's solicitors sought confirmation as to whether Messrs Peter Ling & Van Geyzel have instructions to act for LSL in respect of the adjudication proceedings pursuant to CIPAA so that all relevant correspondences and cause papers may be served on Messrs Peter Ling & Van Geyzel.

[60] Messrs Peter Ling & Van Geyzel replied on 17 October 2018 that they do not have instructions to act for LSL in respect of the adjudication proceeding (see the same exh 'LSL3' at pp 153–154). However, Vision alleged that LSL was aware of the adjudication proceedings as admitted by LSL in paragraph 33 of her *afidavit (1) pemohon* (encl 3) in the following excerpt:

> As Messrs Peter Ling & Van Geyzel was handling my arbitration matter abovementioned, it was intended that I accept personal service of the adjudication papers and upon receipt, appoint another set of solicitors to handle the adjudication.

[61] In light of the affidavit evidence, I am of the view that it is incumbent on Vision to prove that it has served all the adjudication papers on LSL in accordance with s 38 of the CIPAA. The mere fact that LSL is said to be aware of the adjudication proceedings does not relieve Vision of the obligation to serve the adjudication papers on LSL. Vision cannot shift this obligation to LSL by asserting that LSL took no steps to appoint another set of solicitors. It is entirely up to LSL to instruct Messrs Peter Ling & Van Geyzel to accept service of the cause papers related to the adjudication proceedings, or otherwise. In this case, LSL chose the latter and thereby, she is entitled to appoint another solicitor only after having been served the payment claim and notice of adjudication.

[62] With reference to paras 2–3 of the notice of adjudication (exh 'CKW2') in Vision's AIS for the enforcement application at p 38 (encl 2), Vision stated that:

> 2. We attempted to serve the Payment claim by hand on 29.8.2018 and 5.9.2018 *however we were unable to locate the given address*. Our attempt to serve on you the Payment claim by way of Registered Post on 19.8.2018 was also unsuccessful and the same was returned to us. Therefore, there was no response to the Payment Claim.
>
> 3. *We rely on Clause 21.2 of JVA1 and JVA 2* wherein it was expressly stated that *notice served by way of Registered Post to the specified Landowner's address and/or last known address shall be deemed to have been received on the date on which it would have been so delivered in the normal course of posting*. (Emphasis added.)

(see too, paragraphs 19–32 of the adjudication claim dated 15 November 2018 in exh 'LSL3', LSL's first affidavit for the setting aside and stay applications at pp 22–24 (encl 3)). LSL's address in the notice of adjudication and adjudication claim is the same address as the Sg Merab address.

[63] Based on the above excerpt from the notice of adjudication and the paragraphs as above mentioned in the adjudication claim, it can be surmised that Vision had attempted to serve the payment claim in accordance with s 38(a) and (c) of the CIPAA but to no avail. Vision then relied on s 38(d) of the CIPAA to claim that service has been effected by the means as agreed in writing by the parties in the said JVAs.

[64] Since the parties have consented to the setting aside and stay applications, and enforcement application to be heard together, in the course of deliberation of the matter, the court contemporaneously read the affidavits which were filed in respect of the enforcement application. In this regard, the court notes that the clerk employed by Vision's solicitors had affirmed an affidavit of non-service on 22 April 2019 (encl 5 in OS No WA-24C-49–03 of 2019) in respect of attempts to serve the OS and AIS, both dated 28 March 2019, on LSL at the Sg Merab address on 29 March 2019, 8 April 2019, 11 April 2019 and 17 April 2019 only to find that the address does not exist. Vision then applied for substituted service of the OS and AIS vide encl 7, which was duly granted.

[65] By an affidavit of service affirmed on 28 May 2019 (encl 13), the clerk had pasted the cause papers at LSL's address which is stated as No 1, Jalan Lagenda Mas 2, Taman Lagenda Mas, 43800 Dengkil, Selangor, being LSL's last known address as per the Court Order for substituted service dated 26 April 2019 (encl 11).

[66] There is a handful of Malaysian cases which have considered s 38 of the CIPAA. In *AMT Engineering Services v Ah Design Communication Sdn Bhd and another appeal* [2018] MLJU 1860; [2018] 1 LNS 1624, AH Design as the respondent in the adjudication, had applied to set aside the adjudication decision on grounds of breach of natural justice and that the adjudicator had acted in excess of his jurisdiction. In particular, AH Design had alleged that AMT had not properly served the adjudication claim on AH Design, and that though they had applied for an extension of time of 14 days to serve their adjudication response after the last day to serve the same, the adjudicator should have allowed the extension of time. The High Court concluded that as the parties had agreed to e-mail as being an effective mode of service of documents under CIPAA, and that whichever is the earlier mode of service be deemed delivered and received by the recipient, there was no right for AH Design to insist on the hardcopy of the adjudication claim before responding.

[67] In *Skyworld Development Sdn Bhd v Zalam Corp Sdn Bhd and other appeals* [2019] MLJU 162; [2019] 1 LNS 173, the matter in dispute between the parties involved the date of service of the adjudication reply in question. The High Court held that:

> [32] It is clear that in addition to the modes of service as stipulated in section 38(a) to (c) of the CIPAA, section 38(d) of the CIPAA expressly provides that a party is allowed to serve any document under the provisions of the CIPAA 'by any other means as agreed in writing by the parties.
>
> [33] I agree with learned counsel for Skyworld that in the present case, the parties had clearly agreed in writing that the manner of service of documents in the adjudication proceedings may be effected by way of email. This is contained in the adjudicator's Notice of Acceptance to act as the adjudicator ('Form 6') ...

[68] In *Giatreka Sdn Bhd v SGW Engineering Construction Sdn Bhd and another appeal* [2019] MLJU 1477, Giatreka submitted that the purported payment claim is defective, invalid and an abuse of process because it did not comply with the mandatory requirements of sub-s 5(2) of the CIPAA as there was no proper service at Giatreka's usual or last known place of business. The court found that the payment claim was served at Giatreka's registered address, and since it is a body corporate, service of the payment claim at that address is good and proper service pursuant to s 38(a) of the CIPAA.

[69] In the relatively recent case of *Ban Soon Aik Construction Sdn Bhd v Berjaya Land Development Sdn Bhd and another appeal* [2019] MLJU 1232; [2019] 1 LNS 1614, Berjaya Land Development ('BLD') contended that it was not served, and did not receive, the notice of adjudication, and the non-compliance with CIPAA rendered the adjudicator lacking the core and competent jurisdiction to adjudicate and give the adjudication decision. Among the facts that were established in that case is that BLD and its holding company, Berjaya Land Bhd share the same business address. BLDs only complaint was that the notice of adjudication was served on a separate legal entity ie Berjaya Land Bhd. It was my finding that in view of the fact that both these companies have the same business address, Ban Soon Aik Construction ('BSAC') has no control over the arrangement among these companies on the matter concerning acknowledgement of receipt of letters and documents. Ultimately, I held that there was effective service of the notice of adjudication on BLD by leaving the said notice at the usual place of business of BLD during its normal business hours in accordance with the requirements as stipulated in sub-s 8(1) and s 38(b) of the CIPAA.

[70] Interestingly, in *Construction Adjudication in Malaysia* (2nd Ed, Sweet & Maxwell, 2018) by Lam Wai Loon and Ivan YF Loo at pp 513–514, the learned authors had cited Australian and English cases which had considered the provision equivalent to s 38(d) of the CIPAA in those jurisdictions. Under

the section titled 'Deliberately Choosing The Less Effective Mode Of Service To Deprive The Other Party's Chance To Make Representations In The Adjudication Proceedings', the authors discussed the decision in *Rohde Construction v Markham-David* [2006] EWHC 814 (TCC); [2006] BLR 291 to illustrate the point that where a claimant took a deliberate decision which deprived the respondent of the opportunity to make representations in the adjudication, the court would decline to enforce an adjudicator's decision by reason of breach of natural justice.

[71] In *Nageh v Giddings & Anr* [2006] EWHC 3240 (TCC), reference was made to *M Rohde Construction* where Peter Coulson J said that:

> 22. Finally on this point I should note that, *even if service was in accordance with CPR 6.5(6), a Defendant may be able to set aside judgment if the Defendant can show that the Claimant deliberately used an address which it knew was not the right one. In M Rhode Construction v Markhan-David* [2006] EWHC 814 (TCC) the Defendant sought to challenge an adjudicator's decision on the ground that *the adjudication documents were served on an address he had vacated, and not on another address which he said was known to the Claimant and where he could easily have been contacted. The Defendant claimed that the Claimant had deliberately avoided using the address where he was working so as to ensure that the adjudication documents never reached him* Jackson ., said:
>
> > 34 The defendant contends that the claimant deliberately avoided contacting him via the quarry. The claimant deliberately used a method of service, which was unlikely to bring the documents to the defendant's attention.
> >
> > 35 In the context of the present application, where there is no witness statement at all from the claimant, I am certainly not prepared to make any finding of disingenuous conduct on the claimant's part. There is, however, a serious factual issue to be tried in this regard. I would formulate the issue in these terms: *did the claimant have available during the adjudication a ready means of contacting the defendant, which the claimant chose neither to use nor to communicate to the adjudicator* ...
> >
> > 38 If, after hearing evidence in the present case, it turns out that *the claimant took a deliberate decision, which deprived the defendant of the opportunity to make representations in the adjudication, then I consider that this may be one of those rare and exceptional cases in which the court will decline to enforce an adjudicator's decision by reason of breach of natural justice*.
>
> 23. However, *that point, which was at the heart of the judgment in Rhode, simply does not arise in the present case. There is no suggestion that the Claimant here deliberately utilised the wrong addresses, or that there was some other address known to the Claimant where the documents could have been served on the Defendants*. Indeed, in the course of his submissions to me, the First Defendant properly accepted that there was no other address of which he was aware that the Claimant's solicitors could have known about, or could have used, in order to contact him. (Emphasis added.)

[72] Turning to the present case before me, in the notice of adjudication,

A Vision said that it attempted to serve the payment claim by hand on 29 August 2018 and 5 September 2018 but was unable to locate the Sg Merab address. As for service of the OS and AIS in OS No WA-24C-49–03 of 2019, the Sg Merab address is said to be non-existent.

B **[73]** However, LSL had exhibited a photograph of the house bearing the Sg Merab address and it clearly depicts an abandoned house (refer exh 'LSL10' in LSL's AIS at p 1092). In paras 26–29 in its AIR (encl 6), Vision did not make any specific averment to counter the photographic evidence except to say that it has served the adjudication papers to SLS's last known address as indicated in C cl 21.1 in the said JVAs, and LSL did not notify Vision of any change in address and nor is Vision aware of any other addresses.

[74] Vision had quoted part of the judgment of Lee Swee Seng J (now JCA) D in para 45 in the case of *Gazzriz Sdn Bhd*, namely 'A respondent who does not avail itself of the opportunity to file the payment response and adjudication response cannot be heard to shout and scream that there had been a breach of natural justice. it is singularly devoid of merits and will not be entertained by the courts'. However, in *Gazzriz*, the respondent did not raise the issue of E non-service of the adjudication papers and '… for reasons best known to them, did not file a payment response nor an adjudication response', and so it is in this circumstances that the learned judge held that 'Surely, the adjudicator cannot be faulted for considering the claimant's evidence in support of its claim and in the absence of evidence to rebut the claimant's claim, to find on the balance of F probabilities in favour of the claimant'.

[75] In contrast, LSL has provided evidence to show that the Sg Merab address can be located and does exist. If Vision's solicitors had indeed attempted to serve the adjudication papers at the Sg Merab address, they would G have come across an abandoned property as depicted in exh 'LSL10'. As submitted by LSL, Vision's solicitors could then have easily made a search on LSL's IC as seen in exh 'CKW2' in Vision's AIR (encl 6), which it eventually did for purposes of service of the OS and AIS in OS No WA-24C-49–03 of 2019. To my mind, this is a case where Vision have available, during the adjudication, H a ready means of contacting LSL, but Vision deliberately chose not to resort to such means and this basically deprived LSL of the opportunity to make representations in the adjudication. Hence, this falls within the rare and exceptional cases in which the court ought to decline to enforce the said adjudication decision by reason of breach of natural justice.

I **[76]** Taking into account the factual matrix in the instant case as established by the affidavit evidence, it is my considered view that to allow Vision to rely wholly on cl 21 in the said JVAs in contending that s 38(d) of the CIPAA has been met, would be contrary to the interests of justice.

[77] Consequently, I also find that Vision's arguments on the applicability of the doctrine of estoppel by convention as expounded in *Bousted Trading* is without any merit whatsoever.

[78] In sum, the court finds that the adjudication papers have not been effectively served on LSL according to the requirements under s 38 of the CIPAA. The learned adjudicator, in proceeding to determine the issues arising in the adjudication without the payment response and adjudication response due to the non-service of the adjudication papers upon LSL, had breached the *audi alteram partem* rule by failing to accord LSL a fair hearing where she could present her side of the dispute.

Financial constraint

[79] LSL claims that she is facing serious financial constraints and is unable to make the payments as per the said adjudicated decision.

[80] Vision contended that financial constraint is not a ground contemplated under CIPAA to set aside the said adjudication decision, and besides, the purported financial constraint is a bare allegation by LSL which is unsupported by any evidence.

[81] I do not need to delve deeper on this issue as it is immediately apparent that LSL's position is untenable, legally unsustainable and without merit. Financial constraint is certainly not a valid ground to set aside the said adjudication decision.

Reference to arbitration

[82] Clause 8.2 in the said JVAs provide, among others, that '... In the event of any dispute arising as to the selection of the sub-divided building lots by the Landowner, the dispute shall be referred to an arbitrator acceptable to both parties whose decision shall be final and binding upon the parties hereto'.

[83] In the later part of the said JVAs, the provision on 'APPLICABLE LAW AND ARBITRATION' state, inter alia, that:

> 24.1 If any dispute or controversy arises between the Parties herein out of or in the course of performance of this Agreement, the Parties shall endeavor to settle it amicably by mutual agreement.
>
> 24.2 If the parties fail to settle any dispute amicably, such dispute or controversy may be referred to arbitration to be conducted in accordance with the provisions of the Arbitration Act 1952 or any statutory modification or re-enactment thereof for the time being in force, failing which, either party may pursue their respective reliefs in the Court. In the event the Parties wish to appoint a panel of 3 Arbitrators to

A arbitrate the dispute or controversy, then, each of the Parties in dispute shall be entitled to nominate one (1) arbitrator, and the third (3rd) arbitrator shall be appointed by the Bar Council of Malaysia.

...

B

[84] LSL submitted that it is trite that parties which enter into an agreement with a dispute resolution clause must comply with the terms agreed upon to resolve disputes. Ms. Angeline Ang referred to the cases of *Juara Serata Sdn Bhd v Alpharich Sdn Bhd* [2015] 6 MLJ 773 and *Majlis Perbandaran Alor Gajah v* C *Sunrise Teamtrade Sdn Bhd* [2014] 7 MLJ 570 to support this legal principle.

[85] It was further argued that cll 8.2 and 24.2 in the said JVAs indicate that the parties had at all times intended to resolve any dispute arising from the agreements vide arbitration, failing which, parties could pursue their respective D reliefs in court. There was never any intention to adopt adjudication proceedings, exemplifying LSL's contention that the said JVAs are not construction contracts failing within the ambit of CIPAA.

[86] The said adjudication decision is said to have been improperly procured E in light of the above quoted clauses in the said JVAs. Vision is alleged to have chosen to fundamentally breach the arbitration agreement and proceeded with adjudication proceedings although Vision was at all times fully aware of the ongoing arbitration proceeding since LSL has commenced arbitration proceedings as early as 16 August 2018, after Vision and LSL had attempted to F resolve the dispute amicably but failed. It was only after Vision received the notice of arbitration dated 16 August 2018 that Vision commenced adjudication vide its payment claim dated 29 August 2018. Furthermore, letters and emails from LSL's solicitors and the learned Arbitrator, Lambert G Rasa-Ratnam, were exhibited (exh 'LSL9' in the AIS) to support the contention that Vision deliberately disregarded all requests to respond to the claims and/or steps taken in the arbitration proceeding.

[87] Vision's response to this argument is simply that sub-s 37(1) of the H CIPAA allows a dispute to be referred concurrently to adjudication, arbitration or the court. Mr Thomas Mathews highlighted the following passage in *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873; [2015] 1 LNS 1435:

I [38] CIPAA 2012 is clear in recognising that parties wish to keep their contractual dispute resolution choices; and that these choices may be maintained and utilised alongside adjudication. This is obvious from the existence of s 37 which provides for and recognises the concurrent existence of these other remedies. In my opinion, s 37 plainly allows multiple dispute resolution mechanisms to be involved and to operate at the same time ...

[88] I certainly agree with Vision on what sub-s 37(1) CIPAA says, however emphasis must be placed upon the words 'A dispute in respect of payment under a construction contract ...'. In view of the conclusion of the court that the said JVAs and said SAs are not constructions contracts falling within the ambit of CIPAA, the dispute between the parties should rightfully be referred to arbitration as provided under cl 24.2 of the said JVAs.

Stay application

[89] The power granted to the High Court to stay an adjudication decision can be found in s 16 of the CIPAA which states:

> (1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:
>
> (a) An application to set aside the adjudication decision under section 15 has been made; or
>
> (b) The subject matter of the adjudication decision is pending final determination by arbitration or the court.
>
> (2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.

[90] In *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22; [2019] 5 CLJ 479, the Federal Court held that:

> [79] ... Section 16 of CIPAA should be treated as one of the safeguards to a likely wrongful adjudication decision and which empowers the court to find a suitable middle ground in cases where there has been clear and unequivocal errors.
>
> ...
>
> [82] We are in agreement with the contention of the appellant that a more liberal reading of s. 16 of CIPAA would allow some degree of flexibility to the courts to stay the award where there are clear errors, or to meet the justice of the individual case. It is accepted that a stay of the award ought not be given readily and caution must be exercised when doing so ...
>
> ...
>
> [84] The High Court and the Court of Appeal in the present case took the view that no stay was available unless the appellant could show that the respondent was unable to repay the adjudication sum. With respect we are of the view that the correct approach for the High Court under s 16 of CIPAA would be to evaluate each case on its merits without the fetter of a pre-determined test not found in the section itself namely the financial capacity of the contractor to repay. It could be a factor but not the only factor.
>
> [85] ... We are of the view that the Court of Appeal fell into error here when it failed to consider that the application for stay was made under s 16(1)(b) and not s 16(1)(a) of the CIPAA. In any event, s 16(1)(a) specifically provides that the parties

may apply for a stay once an application to set aside an award under s 15 of the CIPAA has been made. It does not say that the application must be made separately. It is clear that the provision is there in aid of an application under s 15.

[91] LSL submitted that both limbs of sub-s 16(1) of the CIPAA are fulfilled. This is undoubtedly so. Furthermore, as reasoned out earlier, I am inclined to agree with LSL's stance that there has been a denial of natural justice and that the learned adjudicator has acted in excess of her jurisdiction.

[92] Whilst I am mindful of the cautionary reminder by the apex court in *View Esteem* that a stay of an adjudication decision should not be given readily, this is one of the rare cases that has come before this court where an applicant has succeeded in discharging the burden of proving that there are clear errors in the making of such a decision on a balance of probabilities which warrants not only an order to set aside the said adjudication decision, but a stay as well.

[93] In the premises, LSL's application for a stay of the said adjudication decision must be allowed.

OS No WA-24C-49-03 of 2019: Enforcement application

[94] The operative provision is s 28 of the CIPAA and it reads:

> 28 Enforcement of adjudication decision as judgment
>
> (1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.
>
> (2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.
>
> (3) The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.

[95] Section 13 of the CIPAA provides for the effect of an adjudication decision in that it is binding unless '... (a) it is set aside by the High Court on any of the grounds referred to in section 15; (b) the subject matter of the decision is settled by a written agreement between the parties; or (c) the dispute is finally decided by arbitration or the court'.

[96] LSL relies on the same grounds to oppose the enforcement application by Vision. Since this court finds that there is merit in LSL's application to set aside the said adjudication decision, it must necessarily follow that Vision's application to enforce the same has to be dismissed.

PRONOUNCEMENT

[97] Based on the aforesaid considerations, the court allowed the setting aside and stay applications, and dismissed the enforcement application. Learned counsel for LSL prayed for costs of RM15,000 for each OS while learned counsel for Vision submitted that cost of RM3,000 for each OS is reasonable. The court ordered that costs of RM10,000 and RM5,000 be paid for the setting aside and stay applications, and enforcement application, respectively, subject to allocator.

Setting aside and stay applications allowed and enforcement application dismissed.

Reported by Nabilah Syahida Abdullah Salleh